

# Towards Corporate Fault as the Basis of Criminal Liability of Corporations

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## Introduction

One of the enduring controversies of corporate criminal liability surrounds the basis of ascription of liability itself. The importance of finding the most appropriate method of ascribing liability cannot be overstated. Not only does it represent the intellectual foundation of corporate criminal liability, it also may, in part, determine whether or not any system of corporate criminal liability engenders widespread public support. Only in circumstances where the basis of liability is seen to be fair and justifiable can broad endorsement be expected. Consensus on the issue of the appropriate basis of liability has so far eluded Anglo-American jurists. In England, of late, there has been much criticism of the basis upon which the criminal liability of corporations is determined. In Scotland there has been no such debate.<sup>1</sup> Indeed there has been a perceptible reluctance to adduce on what basis criminal liability attaches to the corporation for common law crimes.<sup>2</sup> There appears to be little or no independent line of thinking on the issue in Scotland where the judiciary has essentially followed the English approach.<sup>3</sup> It is an approach which is intellectually fraught and ultimately unsatisfactory. The situation is such that it is relatively easy to support the proposition that:

'One of the most pressing tasks facing contemporary ethical and

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<sup>1</sup> Woolfson accuses Scottish academics of patrician disdain: see 'Rising Toll Of Deaths in the Workplace' *The Herald* 27 November 1997.

<sup>2</sup> See Stuart, 'The Case of the Shameless Company' 1980 Vol 26 No 5, *Journal of the Law Society* 176; Ross 'Corporate Liability For Crime' 1990 Scots Law Times 265.

<sup>3</sup> See *Purcell Meats Ltd v McLeod* 1987 SLT 528 cf. *Dean v John Menzies (Holdings) Ltd* 1981 SLT 50.

legal thought is the development of intellectually sound and effective approaches for assessing the moral and legal implication of individuals acting within the context of collectivities such as corporations and of the actions and policies of these collective entities themselves.<sup>14</sup>

Gobert identifies four models of corporate criminal liability.<sup>5</sup> These four 'models', or methods of ascribing liability, can be variously described as vicarious liability, the 'identification' model, the 'aggregation' model and the corporate fault model.<sup>6</sup> By way of amplification, Dan-Cohen offers (without necessarily supporting them) two paradigms in the legal treatment of corporations - the holistic view and the atomistic. Imputing intent from individuals to the corporation is in his view atomistic in conception.<sup>7</sup> The modern academic trend has been away from such atomistic conceptions to a holistic approach. The atomistic conceptions nonetheless have strong roots in the common law jurisdictions and in different guises represent the approach that they all take to the ascription of liability. The imputation of liability from corporate agents at whatever level within the organisation betrays the continued philosophical commitment to the inherent individualism of the criminal law. Only when one is prepared to concede that the corporation as a collectivity can be liable for its own criminal wrongs, does one veer towards an altogether more holistic basis for the ascription of criminal liability. Gobert's four models and Dan-Cohen's paradigms offer a useful template in which to discuss the subject.

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<sup>4</sup> J Surber, 'Individual And Corporate Responsibility: Two Alternative Approaches', 1983, 2, *Business and Professional Ethics Journal*, 67-88 at p 67.

<sup>5</sup> Gobert, 'Corporate Criminality: Four Models Of Fault', 1994, 14, *Legal Studies* 393-410 at p 395 et seq.

<sup>6</sup> 'Developments In The Law. Corporate Crime: Regulating Corporate Behaviour Through Criminal Sanctions', 1979 *Harvard Law Review*, 1229-1375, at pp 1242-3.

<sup>7</sup> See Foerschler, 'Corporate Criminal Intent: Toward A Better Understanding Of Corporate Misconduct', 1990, 78, *California LR* 1287 at p 1298.

## Vicarious Liability

The first obvious attempts at ascribing criminal liability to corporations were done on the back of the established civil law doctrine of vicarious liability. Criminal vicarious liability naturally has its origins in the civil law agency concept.<sup>8</sup> It is often rationalised on the basis of the proximity of relationship between the corporation and its individual human actor. Gobert, for example, argues that:

'[A]s an employer is responsible for selecting, training and supervising the employee, not to mention placing the employee in a position where the offence can be committed, should not the employer also be responsible for the employee's crime? The case for liability becomes even more compelling when the employee has acted to benefit the company and the company has retained the profits generated by the wrongdoing.'<sup>9</sup>

Similarly, it has been claimed, 'Criminal responsibility on the part of the principal, for the act of his servant in the course of his employment, implies some degree of moral guilt or delinquency, manifested either by direct participation in or assent to the act, or by want of proper care and oversight, or other negligence in reference to the business which he has thus intrusted to another.'<sup>10</sup> Fisse points out that there must be limitations of such an approach

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<sup>8</sup> See Kreisberg, 'Decision-Making Models And The Control Of Corporate Crime', 1976, 85 *Yale LJ* 1091 at p 1095; see O W Holmes, 'Agency' 1891, 68, *Harvard LR* 345-64; Wolfenden Report, Chap II pp 9-10 quoted in J H E Williams, 'The Proper Scope And Function Of Criminal Law', 1958, 74, *LQR* 76-81 at p 76; Sayre, 'Criminal Responsibility For The Acts Of Another', 1930, 43, *Harvard LR*, 689-723 at pp 689-694; Khanna, 'Corporate Criminal Liability: What Purpose Does It Serve?', 1996, 109, *Harvard LR*, 1477-1532 at p 1482; Lederman, 'Criminal Law, Perpetrator And Corporation: Rethinking A Complex Triangle', 1985, 76, *Journal of Criminal Law and Criminology*, 285-340 at p 288; T. Baty, 'Criminal Vicarious Liability' in *Vicarious Liability*, (1916); Winn, 'The Criminal Responsibility Of Organisations', 1929, 3, *Camb LJ*, 398-415 at p 398.

<sup>9</sup> Gobert, n 5 at p 396.

<sup>10</sup> Colt J in *Commonwealth v Morgan*, 107 Mass 199,203-4 1871 quoted in Sayre, n 8 at p 711.

in that the aims of civil and criminal law do not coincide.<sup>11</sup> Ashworth, adopting a stance founded on public policy, explains that vicarious liability as a foundation of criminal liability has its basis on 'pragmatism' and the requirements of society.<sup>12</sup>

The historic origins of *respondeat superior* dictated that someone would be liable for the acts of another where they commanded it or procured it.<sup>13</sup> The problem was that procuring or commanding of a crime led to guilt through doctrines of aiding and abetting in any case;<sup>14</sup> the enshrinement of aiding and abetting as a criminal concept impeded the development of criminal vicarious liability. Nonetheless, Sayre identified three exceptions to the rule that there can be no criminal vicarious liability—nuisance, libel and where statute expressly provides for it.<sup>15</sup> The third departure from the basic principle remains of singular importance in the area of corporate crime in the modern era. Where statute expressly provides for vicarious criminal liability any common law rule will be displaced.

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<sup>11</sup> Fisse, *The Social Policy Of Corporate Criminal Responsibility*, 1978, 6, *Adelaide LR*, 361-412 at p 366; Mueller, *Mens Rea And The Corporation*, 1957, 19, *University of Pittsburgh LR*, 21-48 at p 39.

<sup>12</sup> A Ashworth, *Principles Of Criminal Law*, (2nd ed., 1995) at p 113; see also H J Laski, *The Basis Of Vicarious Liability*, 1916, 26, *Yale LR*, 105-35 at p 113. Welsh, *The Criminal Liability Of Corporations*, 1946, 62, *LQR* 345-65 at p 347; see also J L J Edwards, *Mens Rea In Statutory Offences*, (1955), at p 217; see also G Stessons, *Corporate Criminal Liability: A Comparative Perspective*, 1994, *International and Comparative Law Quarterly*, 493-520 at p 519.

<sup>13</sup> Sayre, n 8 at pp 690-1.

<sup>14</sup> Sayre, n 8 at p 649; see *NCB v Gamble* [1959] 1 QB 11 cf *R v Daily Mirror Newspapers Ltd.* [1922] KBD 530.

<sup>15</sup> Sayre, n 8; see also Welsh, n 12 at pp 348 et seq.; see also *R v St Lawrence Corp.*, (1969) 2 OR 305 at p 320 'While in cases other than criminal libel, criminal contempt of court, public nuisance and statutory offences of strict liability criminal liability is not attached to a corporation for the criminal acts of its servants or agents upon the doctrine of *respondeat superior*, nevertheless, if the agent falls within a category which entitles the court to hold that he is the vital organ of the body corporate and virtually its directing mind and will in the sphere of duty and responsibility assigned to him so that his action and intent are the very action and intent of the company itself, then his conduct is sufficient to render the company indictable by reason thereof. It should be added that both on principle and authority this proposition is subject to the proviso that in performing the acts in question the agent was acting within the scope of his authority either express or implied.' see Sayre, n 8 at pp 710-12; see *Triplex Glass Co Ltd. v Lancegay Safety Glass (1934) Ltd.* 1939, 2 KB 394; *Finburgh v Moss Empire Ltd.*, 1908, SC 928.

Sayre draws a sharp distinction between what he calls 'true' crime and petty misdemeanours.<sup>16</sup> He does so on the basis that *respondeat superior* offends our deep seated notion that guilt is personal and individual where the crime involves moral delinquency. This argument that all regulatory crime does not involve moral obliquity remains overly simplistic and as such an unreliable basis on which to exclude vicarious liability from 'true crime.' Sayre nevertheless captures the essence of our disinclination to embrace vicarious liability. Ultimately, the ordinary citizen's perception of crime remains of signal importance, and the offence engendered by the proposition that criminal liability may attach through the actions of another ensures that it can only be justified in certain circumstances. It cannot provide a universal basis for the ascription of criminal liability.

In respect of corporations, vicarious liability may be justified because it is directed to ensuring more internal policing.<sup>17</sup> The deterrence inherent in vicarious liability revolves round greater shareholder and corporate officer attention to the selection of officers and subordinates.<sup>18</sup> As a model of liability, it certainly has utilitarian value in obviating problems of ascribing liability where the wrong is committed by the lower level official.<sup>19</sup> Because liability transmits through the wrongdoer to the corporation, individuals need not be prosecuted.<sup>20</sup> That may not be a good precept on which to operate in all circumstances; there will be many instances where the individual should rightly be prosecuted in addition to the corporation. Vicarious liability may also be justified on the basis of criminal law's chief aim of prevention and on

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<sup>16</sup> Sayre, n 8 at p 717.

<sup>17</sup> L. H. Leigh, *The Criminal Liability Of Corporations In English Law*, (1969), at p 75; see also *James and Sons Ltd v Smeed*, [1954] 1 QBD 273 per Lord Parker at p 279.

<sup>18</sup> Cf. Welsh n 12 at p 286 believes, 'While an additional deterrent effect might be gained by applying *respondeat superior* to all crimes of corporate agents, no characteristic peculiar to corporations demands exceptional measures. Large corporate assets combined with the possible financial irresponsibility of the agent - in cases where a fine is imposed - are not legitimate reason for straining established criminal concepts.'

<sup>19</sup> A. J. Duggan, 'The Criminal Liability Of Corporations For Contraventions Of Part V Of The Trade Practices Act', 1977 5 *Australian Business LR* 221-247 at p 222.

<sup>20</sup> J. S. Parker, 'Criminal Sentencing Policy For Organisations', 1989 26 *American Criminal LR*, at p 523.

the legitimate criminal goal of compensation.<sup>21</sup>

Notwithstanding its positive attributes, vicarious liability has been the subject of criticism based primarily on the injustice of vicarious liability and its inefficiency in respect of corporate criminal liability.<sup>22</sup> There are many who find vicarious liability as a basis of ascription of liability anathema to the proper notion of criminal liability. Sayre, for example, has stated that, 'Vicarious liability is a conception repugnant to every instinct of the criminal jurist.'<sup>23</sup> Edwards similarly took the view that:

'So long as modern legislation continues to intrude itself into every sphere of trading, business, health and social welfare activities, laying down elaborate codes of conduct to be observed by responsible officials so, too, the doctrine of vicarious liability will continue to be an evil necessity. But each gesture on the part of the judiciary and of the legislature which refuses to extend the obnoxious principle is to be applauded.'<sup>24</sup>

Another major objection to *respondeat superior* as the basis for corporate criminal liability is adduced in a *Harvard Law Review* note which points out that:

'Once *respondeat superior* is applied to crimes, however, the stigma of conviction becomes weakened as the public begins to recognise that criminal liability may not signify lack of good faith

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<sup>21</sup> See Coffee, 'Corporate Criminal Responsibility' in Kadish, *Encyclopaedia Of Crime And Justice* Vol 1, (1984), at p 257.

<sup>22</sup> Coffee, n 21 at p 257.

<sup>23</sup> Sayre, n 8 at p 717; Khanna, n 8 at p 1485. Holt himself rejected criminal vicarious liability in *Hern v Nichols* 1 Salk 289 (1708). The question of criminal *respondeat superior* was posed and clearly repudiated in *Rex v Huggins* 2 Strange 882 (1730); see also see *R v Holbrook* 4 QBD 42 (1878); *Chisolm v Doulton* 22 QBD 736 (1889); *Hardcastle v Bielby* [1892] 1 QB 709; see *Gair v Brewster* 1910 SLT 36 per Lord Justice General at p 38

<sup>24</sup> Edwards, n 12 at p 243.

on the part of corporate management.<sup>25</sup>

Gobert offers some understanding of the difficulty in using vicarious liability as a model for criminal liability.<sup>26</sup> The practical difficulty in supervising what may be thousands of employees represents an enormous burden on an employer. In Gobert's view supervision can be supplanted by policy formulation designed to ensure that employees and the company remain within the confines of the law. Vicariously liability as a fault attribution model retains the problem that a company may become criminally liable in circumstances where the majority of its employees have not broken the law and the company has taken reasonable (or indeed exemplary) steps to prevent criminal conduct. According to Leigh, *respondeat superior* cannot be considered to be a satisfactory general basis of liability.<sup>27</sup> It is inherently unfair in that liability might ensue even in circumstances where the company has expressly forbidden the act. One of the other key deficiencies of vicarious liability as the basis on which to ascribe corporate criminal liability is the fact that it only impacts on the *actus reus* of the crime. As Gobert explains, 'courts that are prepared to attribute an employee's act to the company may balk at attributing the employee's mental state as well.'<sup>28</sup> Writing in 1978, Fisse argued that '[A]lthough states of mind are now attributable personally to corporations under the identification principle, the results of applying that principle are so dysfunctional that vicarious liability retains much vitality.'<sup>29</sup> This may in part explain the continued recourse to vicarious liability as a model of corporate liability in certain spheres. For all its truth, it represents a somewhat impoverished rationale for vicarious liability as a universal basis of corporate criminal liability.

Vicarious criminal liability continues to be found in many statutory

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<sup>25</sup> Note: 'Criminal Liability Of Corporations For Acts Of Their Agents', 1946 60 *Harvard LR*, 83-289 at p 286.

<sup>26</sup> Gobert, n 5 at p 397.

<sup>27</sup> Leigh, n 17 at p 118 *op cit*.

<sup>28</sup> Gobert, n 5 at p 399.

<sup>29</sup> Fisse n 11 at p 366.

criminal offences. In the United Kingdom the position in respect of these regulatory offences is well settled; vicarious liability applies in respect of strict liability offences and now also to offences of negligence or hybrid offences (those providing due diligence or reasonable knowledge test).<sup>30</sup> Despite several early cases where vicarious liability was used as the underpinning model of criminal fault, other than in strict liability statutory offences there appears to be little current enthusiasm for pursuing this as a basis of corporate criminal liability. An illustration of such reluctance is to be found in the relatively recent case of *Seaboard Marine Offshore Ltd v Secretary of State for Transport*.<sup>31</sup>

There is evidence that some courts have not entirely ruled out the application of the concept of vicarious liability in corporate criminal liability.<sup>32</sup> However in *Meridian Global Funds Management Asia Ltd v Securities Commission*,<sup>33</sup> the Privy Council again rejected vicarious liability as the basis of corporate criminal liability, holding that a person of high standing had to be found within the company whose acts and knowledge can be attributed to the company.<sup>34</sup> Nevertheless, vicarious liability remains a vital part of the corporate criminal liability equation where it is clearly required in specific statutory offences.<sup>35</sup> The expansion of regulatory offences has in this context significant importance. The real problem in adopting an expansive approach extending vicarious liability beyond specific regulatory offences, is that 'vicarious liability for serious crime is at variance with fundamental values

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<sup>30</sup> Wells, 'Cry In The Dark: Corporate Manslaughter And Cultural Meaning' in Loveland (1995) at p 111; *Wright v Ford Motor Co* [1967] 1 QB 230; *Gammon (HK) Ltd v A-G of Hong Kong* [1984] 2 All ER 503.

<sup>31</sup> [1994] 2 All ER 99.

<sup>32</sup> *National Rivers Authority v Alfred McAlpine Homes East Ltd*, *The Times*, 3 February 1994; *Re Supply of Ready Mixed Concrete* [1995] 1 All ER 135.

<sup>33</sup> [1995] 3 All ER 918.

<sup>34</sup> See however the confusing dicta of Lord Hoffman [1995] 1 All ER 918 at p 928.

<sup>35</sup> Mueller, n 11 at p 21.



embedded in both common law and civil systems.<sup>36</sup> For all this it remains useful in respect of certain statutory offences and as such might well be retained in respect of those particular crimes as part of our system of corporate criminal liability on the basis of pragmatism and efficacy.

## The Identification Doctrine

The second 'model' of criminal liability proffered by Gobert and discussed in a plethora of writings is what is known as the 'identification theory.' The essence of this theory is that the corporation attains criminal liability through a direct connection between the company and the person responsible for the criminal harm; an individual or individuals are of sufficient standing that they are 'identified' with the company. This model of criminal liability is often referred to as the 'controlling mind theory' or the 'alter ego' doctrine.<sup>37</sup> As a method of ascribing criminal liability it is most famously expounded in *Tesco Supermarkets Ltd v Natrass*.<sup>38</sup> However, development of the concept can be traced to earlier cases. Lord Denning argued in *H L Bolton Co Ltd v TJ Graham and Sons Ltd*<sup>39</sup> that,

[A] company may in many ways be likened to the human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company and control what it does. The state of mind of those managers is the state of mind of the company

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<sup>36</sup> I. H Leigh, 'The Criminal Liability Of Corporations And Other Groups: A Comparative View', 1982 80 *Michigan LR*, 1508-1529 at p 1514.

<sup>37</sup> See Farrar, *Farrar's Company Law*, (3rd Ed, 1991) at pp 759-760; see also *Wings Ltd v Ellis* [1985] 1 AC 272.

<sup>38</sup> [1972] AC 153.

<sup>39</sup> [1957] 1 QB 159.

and is treated by law as such.'

Wells<sup>40</sup> pinpoints three earlier cases as being significant in the adoption of the alter ego doctrine - *DPP v Kent and Sussex Contractors*,<sup>41</sup> *R v ICR Haulage*,<sup>42</sup> and *Moore v Bresler*.<sup>43</sup> However, one can go back further to an even earlier authority to see both the formulation of the idea of an 'alter ego' doctrine and its relationship with vicarious liability. In *Lennard's Carrying Company Ltd v Asiatic Petroleum Company Ltd*<sup>44</sup> Viscount Haldane said,

'[A] company is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purpose may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. That person may be under the direction of shareholders in general meeting; that person may be the board of directors itself, or it may be, and in some companies it may be so, that the person has an authority to co-ordinate with the board of directors given to him to co-ordinate under the articles of association. It must be upon true construction of that section in such a case as the present one that the fault or privity of somebody who is not merely a servant or agent for whom the company is liable because his action is the very action of the company itself.'

The modern authority generally accepted as the leading case in the United Kingdom on the 'alter ego' doctrine is *Tesco Supermarkets Ltd v Natrass*. In this case the company was charged with an offence under section

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<sup>40</sup> C Wells, 'Corporations: Culture, Risk And Criminal Liability', 1993, *Criminal LR* 551-566 at p 559.

<sup>41</sup> [1944] 1 KB 146.

<sup>42</sup> (1944) 30 Cr App R 31.

<sup>43</sup> [1944] 2 All ER 515.

<sup>44</sup> [1915] AC 705.

11(2) of the Trades Description Act 1968. The substance of the offence was that the company had advertised goods for sale at a price less than the price on the goods actually for sale. Evidence disclosed that a branch of the company had run out of specially priced items and they had been replaced with similar items at their normal price and that the company's branch manager had authorised the action taken. As a consequence the goods on display were more expensive than the advertised price of the goods. Section 24 of the 1968 Act offers a defence to a section 11(2) charge. It states:

'In any proceedings for an offence under this Act it shall...be a defence for the person charged to prove - (a) that the commission of the offence was due to...the act or default of another person...and (b) that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence.'

Section 20 of the same Act states that:

'where an offence under this Act which has been committed by a body corporate is proved to have been committed with the consent and connivance of...any director, manager, secretary or other similar officer of the body corporate... he as well as the body corporate shall be guilty of that offence.'

The company sought to rely upon the defence in the statute arguing that it had exercised due diligence and that the manager was 'another' for the purposes of the Act. In accepting the company's contention the House of Lords held that the manager was not sufficiently senior to constitute the 'controlling' mind of the company.<sup>45</sup> The decision in *Tesco Supermarkets v*

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<sup>45</sup> Support for Lord Reid's *Natras* approach is invariably drawn from the Canadian case of *R v St Lawrence Corporation* (1969) 2 O R 305 where Schroeder J A said, "if an agent falls within a category which entitles the Court to hold that he is a vital organ of the body corporate and virtually its directing mind and will in the sphere of duty and responsibility assigned to him so that his action and intent are the very action and intent of the company itself, then his conduct is sufficient to render the company indictable by reason thereof. It should be added that both the principle and authority this proposition is subject to the proviso that in performing the acts in question the agent was acting within the scope of his authority either express or implied."

*Natrass* has attracted considerable criticism. For example Gobert claims that:

'[T]he test of *Natrass* is under inclusive in that the range of persons within a large company who will possess the relevant characteristics to render the company liable will inevitably be a rather small percentage of those who work for the company. The consequence is that the company will be able to escape criminal liability for most acts of its employees. In large companies such as Tesco there will be many layers of management. No one person or persons at the centre can be expected to oversee the daily affairs of the hundreds of supermarkets which the company operates. Day-to-day decisions will perforce have to be entrusted to local managers. Yet this discretion, because it relates to the implementation of policy rather to its formulation, will not be sufficient to bring the branch manager within the test of *Natrass*. Under *Natrass* a business is inevitably converted into a legal defence. Further, by their decision their Lordships encourage a management structure which favours devolved decision-making, not for the theoretical merit, but because it will help to insulate the company from criminal liability.'<sup>46</sup>

*Natrass* represents a crude distinction between the 'hands' and 'brains' of the company. The distinction is a simple one and, for some commentators, one ill-suited to modern complex command structures. The *actus reus* of the crime is more likely to be committed at a much lower level than director level. Trying to match the *actus reus* committed by a lower level employee with the *mens rea* of higher level employees has a certain inconsistency of approach. Gobert again argues:

'One of the prime ironies of *Natrass* is that it propounds a theory of corporate liability which works best in cases where it is needed least and works least in cases where it is needed most. The directors and managers of small companies who are most likely to satisfy the *Natrass* test are also likely to be directly involved in

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Gobert, n 5 at p 400.

carrying out of the company's affairs and thus criminally liable in their own right; vicarious and corporate liability are largely superfluous for deterrent purposes. In large companies, on the other hand, there is far less likelihood of personal involvement by senior management in day-to-day activities. As a result, the possibility of personal criminal liability is not much of a deterrent while the *Natrass* test frustrates efforts to impose corporate liability.<sup>47</sup>

Muir notes that *Natrass* creates a discriminatory rule in favour of the larger employer.<sup>48</sup> In addition he further notes one of another of the unfortunate consequences of *Natrass* and that is 'If the corporation can expect to escape liability on proof of a servant's fault it may be less inclined to do no more than maintain an adequate "paper" system for presentation to the court as evidence of due diligence on its part or perhaps of the defendant being "another person"'.<sup>49</sup> Field and Jorg criticise the identification doctrine on the basis that it does not adequately reflect the limits of corporate moral responsibility.<sup>50</sup> In their view, to limit it to high-ranking corporate actors is unduly restrictive and that, priorities in hierarchical organisations like corporations are set predominately from above. It is those priorities that determine the social context within which a corporation's shop-floor workers and the like make decisions about working practices. A climate of safety or unsafety may permeate the entire organisation but be created at the highest level. Thus, if criminal law is to reflect this moral responsibility, in appropriate cases legal responsibility ought to extend to acts done by the 'hands' of the corporation. Fisse is also critical of the identification theory describing it as a:

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<sup>47</sup> Gobert, n 5 at p 401.

<sup>48</sup> Muir, 'Tesco Supermarkets, Corporate Liability And Fault', 1973,5 *New Zealand Universities LR* 357-372.

<sup>49</sup> Muir, n 48 at p 367.

<sup>50</sup> S Field and N Jorg, 'Corporate Liability And Manslaughter: Should We Be Going Dutch?', 1991, *Crim LR* 156-171 at p 159.

'vision which is blind to organisational theory and practice [amounting] to an anthropomorphic illusion...The truth is that corporations are materially different from human persons both in constitution and being. To rely upon anthropomorphic assumptions at the expense of corporate reality is simply to succumb to the myth of the metaphor.'<sup>51</sup>

One of the perceived problems of the identification theory is that following the *Natrass* decision there is clear authority for suggesting that only those at the very core of the corporation may impute guilt to it.<sup>52</sup> So far, as one writer has pointed out '[n]o indication is apparent for what criteria are to be employed in determining who falls within the "inner circle".'<sup>53</sup> Plausibly each situation may turn on its merits but there is no authority to that effect from the House of Lords or the Scottish Court of Criminal Appeal. What then might be the criteria for 'identification'? Stern offers several criteria for defining the 'organ' which will attach liability. First, rather unhelpfully Stern offers 'vague description' as one means of identifying the appropriate individuals. There is little difficulty in finding support for this vague rather haphazard approach. The case law, particularly English case law, points to the court offering up such nebulous concepts as 'the very ego and centre', 'the directing mind and will' or 'control centre' or corporate 'brains' or the 'primary organs'. As Stern suggests there is frustration in defining the organ as something more than other employees of the corporation.<sup>54</sup> It has been suggested that the primary organs test dictates that the criminal mind is to be located in the minds of 'those agents who can act under the direct authority of the constitutional document and regulations of the corporation without the intervention of any

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<sup>51</sup> Fisse, n 11 at p 366.

<sup>52</sup> Wells, 'A Quiet Revolution In Corporate Liability For Crime', 1995, 145 *NLJ* 1326-1327 at p 1326; cf *Henshall (Quarries) Ltd v Harvey*, 1965, 2 QB 233; *R v Weatherfoil Ltd* [1972] 1 All ER 65; see also Schaff, n 43.

<sup>53</sup> Y Z Stern, 'Corporate Criminal Personal Responsibility - Who Is The Corporation?', 1987, 13 *Journal of Corporation Law* 125-43 at p 131.

<sup>54</sup> Stern, n 53 at p 132; *DPP v Kent and Sussex Contractors Ltd*, *supra*.

further human act.<sup>55</sup> Such a test was advanced by Lord Diplock in *Natrass*. The test itself suffers from the same issues which *Natrass* generally raises. Primary organs may have very little direct input into the actings of the company. They may exercise nothing more than mere approval. Others within the organisation may exercise considerable power and indeed may be considered organs of the company without being primary organs of the company. Conversely, lower-order officials may have significant powers in modern bureaucracies. Such officials might not be named in corporate documents but may, nonetheless, exercise considerable power. It seems fairly obvious that primary organs are not the sole organs particularly in complex modern bureaucracies. Fisse criticises Lord Diplock's confinement of corporate officers to the formal constitution as resting on the patently false assumption that a corporation's constitution reflects the true nature of its managerial functions.<sup>56</sup> The major appeal of such a test is the certainty that it offers in identification. Only those expressly named in company documents would have the power to attach criminal liability to the company. The limitations of this approach are self-evident; a company could evade liability by being economical with the number of named officials. Equally objectionable is the notion that the company alone may determine who can create criminal liability. Policy considerations in criminal law dictate that the State should determine the parameters of criminal liability and it clearly offends that concept were the corporation to self-regulate its liability by narrowing the numbers of individuals who may be identified with the corporation.

An alternative test offered by Stern is the delegation test.<sup>57</sup> This test retains a linkage to company documentation. The nexus with the company documents conveys an image of certainty and express identification. In this

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<sup>55</sup> Powell, *The Law Of Agency*, (1961).

<sup>56</sup> Fisse, 'Consumer Protection And Corporate Criminal Responsibility: A Critique Of *Tesco Supermarkets v Natrass*', 1971, 4 *Adelaide LR* 113-129 at p. 121; *Tesco Supermarkets Ltd. v Natrass* per Lord Diplock at p 199 'The obvious and only place to look to discover by what natural persons its powers are exercisable, is in the constitution.'; see also *Seaboard Marine Offshore Ltd v Secretary of State for Transport* [1994] 2 All ER 99 at p 104; for a full discussion of the distinction between manager and officer see *R v Boal* [1992] 3 All ER 177.

<sup>57</sup> Stern, n 53 at p 133.

instance identification with the company would be through those thought to have delegated from the company documents. The flaw in such a test is the lack of precision. The flexibility it introduces permits courts to deduce in the given circumstances who has the delegated authority. The lack of precision reduces the test to little more value than the vague description approach currently adopted by the courts.

Stern thirdly, offers the 'authorised acts test'.<sup>58</sup> Here one inevitably observes the language of vicarious liability rooted in the law of agency. Identification is with the acts authorised by the primary representatives rather than those carried out by them. As a consequence any employee of the organisation might be identified as the mind of the company. Unlike the other tests this one has its affinity to the acts perpetrated rather than the individuals. In this sense it is less anthropomorphic in conception. The authorised acts test's primary flaw lies in the fact that only directly authorised acts attach criminal liability; generally authorised acts will not attach liability. Even if the test had some merit it would nonetheless raise questions as to the mode of authorisation and more importantly, unauthorised acts. Though Stern makes no mention it is possible that acts need not be expressly authorised. There may be implied authorisation under the agency doctrines of apparent or ostensible authority and holding out.

Another of Stern's tests - 'corporate selection test' - is in many respects similar to the primary organs test in that it permits the corporation to determine who the organs are. The approach entails the corporation filing with State authorities (obviously Companies House in the UK) documents identifying the organs by name or position. The poverty of this as a basis of identification is obvious; the criticisms which pertain to some of the earlier tests are apposite. This approach would amount to nothing more than self-regulation and would in the opinion of the writer prove so ineffectual as to be meaningless.

Stern also offers what he calls 'a pragmatic approach'.<sup>59</sup> Arguably, the current approach of the British courts is one based on pragmatism. The strength and weakness of such an approach is adequately described by Stern

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<sup>58</sup> Stern, n 53 at p 133.

<sup>59</sup> Stern, n 53 at p 134.



who contends 'its strategy might give more substance to the abstract descriptions of the organ, while softening the formal criteria's intransigence.' The pursuit of a suitable test however is premised on the premise of greater certainty. Abstraction clearly cannot achieve this and for that reason alone this test must be of limited value for those in pursuit of definition. Pragmatism as a test, if such a test exists, may require certain constraining features which for the purposes of this study may be described as sub-tests. Stern concludes that:

'[T]he common goal of all the criteria analysing the hierarchy of the legal body is to identify those individuals who are sufficiently important in the corporate hierarchy that their will and acts might be considered those of the corporation itself. The complex task is to draw the exact line in the hierarchy which separates individuals who are the ego of the corporation from those who are merely its representative.'<sup>60</sup>

This may be so for those supportive of the identification theory. Stern's approach is to find a test which works within that context. Others have sought a different formulation entirely for the ascription of criminal liability. Stern, in an effort to make the pragmatic test work, offers two constraining reference points: analysis of hierarchy and analysis of function. Illustration of the pragmatic approach in respect of hierarchy can be found in the Model Penal Code in America which states that:

'A corporation may be convicted of the commission of an offence if and only if...(c) the commission of the offense was authorised, requested, commanded, or performed by the board of directors, or by an agent having responsibility for formation of corporate policy, or by a high managerial agent having supervisory responsibility over the subject matter of the offence and acting within the scope of his employment in behalf of the corporation.'

Like most hierarchical analysis, the Model Penal Code fails to

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<sup>60</sup> Stern, n 53 at p 135.

differentiate the real policy makers.<sup>61</sup> Another major criticism is the inequality in merely ascribing liability on the basis of function.<sup>62</sup> Nonetheless, analysis by function may ironically be more utilitarian than pragmatism.<sup>63</sup> Here one considers not who the individual is but what he does regardless of his position in the hierarchy. Even shadow directors may act in a way which may incur criminal liability for the corporation. This seems more truly a pragmatic approach. Of equal importance is whether the function performed is of the corporation or for the corporation. In the spirit of true pragmatism Stern offers a solution to the inherent deficiencies of the hierarchical and function tests and that is to combine both.<sup>64</sup>

Kelly also notes the difficulty of identifying individuals to whom to attach corporate liability under alter ego doctrine. His solution is a definition in terms of control and management which he believes would address the differential that exists between different corporations.<sup>65</sup> What about persons who manipulate the company without occupying a formal position in it? Will they be liable under the identification theory. Leigh, following the line in *R v St Lawrence Corp*, adopts the view that it is correct to restrict the identification theory to employees acting within the scope of their employment or their authority. Leigh's argument is that:

'The doctrine of identification originated as a device to ascribe personal liability to corporations where this was necessary in order to hold them civilly liable. In criminal law, however, it tends to be assumed that the doctrine means that for all purposes of criminal liability a corporation possesses a mind - that of its controllers. But a court could return to the original root and hold

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<sup>61</sup> Stern, n 53 at p 136.

<sup>62</sup> Welsh, n 12 at p 360.

<sup>63</sup> The function test was developed by Professor Barak, 'The Status Of The Entity In Torts', 1966, 22 *Hapraklit* 198 at pp 204-7.

<sup>64</sup> Stern, n 53 at p 140.

<sup>65</sup> Kelly, 'Corporate Manslaughter And UK Common Law: Lessons To Be Learned From Our Experience?', 1991, 6 *OGLTR* 177-87 at p 179.

that the doctrine of identification should apply only where for policy reasons it is necessary to hold a corporation liable.<sup>66</sup>

Certainly the distinction between vicarious liability and primary liability is both significant and relevant. Writing before the landmark case of *Natrass*, Fisse indicated that:

'[o]nce a distinction is drawn between primary and vicarious liability it clearly follows that the conduct of some servants or agents cannot be imputed to a corporation where primary liability is imposed. Authority is to the effect that primary (as opposed to vicarious) liability may be imposed in respect of the conduct of a managing director, a general manager, and even a secretary. Obviously primary liability would be imposed in respect of the conduct of either the general meeting or the board of directors. However, no clear discrimination between superior and inferior agents or servants emerges from the case law.'

Edgerton had earlier offered a rationale in favour of primary liability. In his view it would enhance the notion of deterrence if the corporation was held directly criminally liable. Moreover, it would operate to influence shareholders and higher officials to subordinate lower-ranking officials. Finally, Edgerton saw the advantage in primary liability in the fact that it would overcome the need to identify the person who commits the *actus reus*.<sup>67</sup> Fisse is critical of Edgerton's view on the basis that the latter's position offered no thesis as to why corporate criminal liability should be expanded more widely than individual liability.<sup>68</sup> In respect of Edgerton's third point, it is interesting to note that Fisse was critical on the basis that it may lead to the elimination of *mens rea* from offences simply because it is difficult. The

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<sup>66</sup> Leigh, 'The Criminal Liability Of Corporations and other Groups', 1977, 9 *Ottawa L R* 247-302 at p 261.

<sup>67</sup> Edgerton, 'Corporate Criminal Responsibility', 1927, 36 *Yale Law Journal* 827-844.

<sup>68</sup> Fisse, 'The Distinction Between Primary and Vicarious Corporate Criminal Liability', 1967, 41 *Australian L J* 203-210.

experience since Fisse's early thesis has not borne out his criticism. Indeed, deeper analysis points to the fact that identification with all corporate agents and servants need not of necessity result in the dispensing of the requirement of *mens rea* where the alleged crime has such a requirement. The attribution of primary liability in the modern era has been indicative of a desire to root out the criminal mind within the corporation and not to eliminate *mens rea* as a requirement altogether. Fisse's conclusion in 1967 was that 'primary liability... should be imposed only in respect of the conduct of the general meeting, the board of directors and less clearly the managing director.' That conclusion represented a prognosis which the House of Lords in *Natras* seemed relatively eager to adopt.

It has been suggested that 'The simplest and most sensible explanation is that the identification liability is a modified form of vicarious liability under which the liability of a restricted range of personnel is imputed to the corporation.'<sup>69</sup> The English Law Commission's Working Paper No 44 argued for an extension to the identification theory so that corporate actors other than board members would be included. Their formulation was to include those managers where the management function delegated was substantial.<sup>70</sup> In New Zealand there are authorities which offer an interesting contrast with *Tesco Supermarkets v Natras*. In *Meulens Hair Stylists v Commissioner for Inland Revenue*<sup>71</sup> the court adopted a test of 'responsible servant' (in this case the company secretary). Similarly, in *Upper Hutt Motor Bodies Ltd v CIR*<sup>72</sup> McGregor J emphasised the notion of empowerment rather than the corporate brain idea.<sup>73</sup> Contrast this with the UK decision in *R v Redfern and Dunlop Ltd*<sup>74</sup> where it was held that the European Sales Manger of Dunlop (Aviation)

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<sup>69</sup> Colvin, 'Corporate Personality And Criminal Liability', 1955, 6 *Criminal Law Forum* 1-44 at p 13.

<sup>70</sup> Andrews, 'Reform In The Law Of Corporate Liability', 1973, *Crim LR* 91-97 at p 96.

<sup>71</sup> [1963] NZLR 797.

<sup>72</sup> [1964] NZLR 953.

<sup>73</sup> See also *Morris v Wellington City* [1969] NZLR 1038; *Sweetman v Industries and Commerce dept* [1970] NZLR 139 where Richmond J held that the internal arrangements between the hands and the brains were irrelevant and that directors could not hide behind ignorance.

<sup>74</sup> (1993) *Crim LR* 43.

Ltd was not sufficiently senior to be the alter ego of the company. However, two recent cases have accepted the attribution of knowledge to lower level officials : *Tesco v London Borough of Brent*<sup>75</sup> and *El Ajou v Dollar Land Holdings Plc.*<sup>76</sup> In *Tesco Supermarkets Ltd v London Borough of Brent* the company was charged with an offence contrary to section 11(11) of the Video Recordings Act 1984 whereby one of their employees sold a video classed '18' to a 14-year old. Saughten LJ offered the view that it was 'absurd to suppose that those who manage a vast company would have any knowledge or any information as to the age of a casual purchaser of a video film. It is the employee that sells the film at the check out point who will have knowledge or reasonable grounds for belief. It is her knowledge or reasonable grounds that are relevant.' Such a view is difficult to reconcile with the *Natrass* doctrine and illustrates the incoherence of adopting the *Natrass* approach. In *El Ajou*, Nourse LJ adopted a practical view of a complex financial fraud and in the process held that it was not the board of directors that was the controlling mind but the person who had *de facto* management. According to Nourse 'the authorities show clearly that different persons may for different purposes satisfy the requirements of being the company's directing mind and will.' In *Camden London Borough Council v Fine Fare Ltd*<sup>77</sup> a slightly different approach was adopted. The case essentially endorsed the *Natrass* view that it was the directors who were the controlling mind but Glidewell J suggested that officers below the rank of director might be in a position to indicate what the state of mind of the directors was. In *R v Redfern and Dunlop Ltd*<sup>78</sup> the court re-emphasised the notion of control, claiming that 'administrative or executive functions which did not confer true power of management and control would be insufficient.' These most recent cases illustrate the clear problems that a strict interpretation of the *Natrass* doctrine creates. There is no certainty in just who the controlling mind of the corporation is. In the process of seeking accommodations with the *Natrass*

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<sup>75</sup> [1993] 2 All ER 718.

<sup>76</sup> [1994] 1 BCLC 464.

<sup>77</sup> [1987] QBD BTLC 317.

<sup>78</sup> (1993) Crim LR 43 at p 45.

philosophy the case law is becoming confused and confusing. In respect of the *Natrass* doctrine Wells claims that:

"The idea that only certain people act as the company presents a problem over and above the difficulties attending any such line-drawing exercise. While the company is at one level a "fiction" it is at another real. Once individuals in the company do anything which is part of the greater enterprise of which they are a part, then they contribute to the corporate effect. Whatever the branch manager of Tesco did with special offers... he was only able to do so because the company had invested and maintained the shop, the supplies to it, the posters advertising the offer and so on. When the Assistant Bosun on the *Herald of Free Enterprise* slept instead of doing his job, he was caught up in a past, present and future, a network of obligations and implications, which the corporation for which he worked provided not only the equipment and the *raison d'être* but also the operating rules and procedures. The notion that some working within that structure act as that corporation while others do not is flawed and requires re-examination in the context of imposing criminal liability."<sup>79</sup>

Quite simply the identification theory ignores the reality of modern corporate decision-making which is often the product of corporate policies and procedures rather than individual decisions.<sup>80</sup> Both the Hidden Report into the Clapham Junction Railway Disaster and the Fennell Report into the Kings Cross Fire, as well as the Sheen Report into the Zeebrugge Ferry Disaster illustrate how processes for decision-making at the highest level contributed to failures of subordinates which led to major incidents.<sup>81</sup> It seems trite to

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<sup>79</sup> Wells, n 40 at p 560.

<sup>80</sup> C Clarkson, 'Kicking Corporate Bodies And Damning Their Souls', 1996, 59 *Modern LR* 557 at p 561.

<sup>81</sup> Hidden Report (1989) *Investigation into the Clapham Junction Railway Accident*, Cm 820 (London : HMSO); Fennell Report (1988) *Investigation into the Kings Cross Underground Fire* Cm 499 (London: HMSO); Sheen Report (1987) *MV Herald of Free Enterprise : Report of the Court No 8074 Dept Of Transport* (London: HMSO); See also Field and Jorg, n 50 at pp 168-9.

suggest that organisational contexts and collective processes considerably influence the actions of minor individuals within those organisations. All of those disasters displayed a measure of acceptance primarily through ignorance and indifference and casualness. In all the situations there was no question that the corporations had the power to influence or control what the subordinates were doing.

The identification theory is not without its supporters;<sup>82</sup> in Britain it retains a pivotal position as the main method of ascribing liability for common law crimes and those statutory crimes which require *mens rea*. As a doctrine it has undergone little modification since it was first mooted in 1915.<sup>83</sup> For all that, it should not 'occasion surprise that scholars elsewhere refuse to treat liability ascribed through identification or high managerial agent as truly personal... To many European scholars... the common-law systems seem to have set the theoretical problems aside rather than to have solved them.'<sup>84</sup> Fisse argues that identification should be abandoned as not coinciding with the possible justifications of corporate criminal responsibility.<sup>85</sup> *Natrass* prevents imposition of liability where it is justified and allows imposition where it is unnecessary.<sup>86</sup> More significantly, the *Natrass* principle fails to reflect the concept of organisational blameworthiness so inherent in much of corporation's criminal conduct.<sup>87</sup>

## The Aggregation Model

The aggregation model represents an extension to the identification

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<sup>82</sup> In 1985 The English Law Commission published a Draft Code of the Criminal Law which incorporated an earlier (1972) Working Party Report into Corporate Criminal Liability. In the Code they opted to retain the alter ego doctrine. ( see Kelly, n 65 at p 177).

<sup>83</sup> Kelly, n 65 at p 178.

<sup>84</sup> Leigh, n 36 at p 1527.

<sup>85</sup> Fisse, n 56 at p 127.

<sup>86</sup> Fisse, n 56 at p 127.

<sup>87</sup> Fisse, 'Recent Developments In Corporate Criminal Law And Corporate Liability To Monetary Penalties', 1990, 13 *University of New South Wales J* 1-41 at p 3.

model whereby the criminal mind is identified in the collectivity of corporate personnel. Stone explains the essence of aggregation claiming:

'All that is needed... is the stipulation that some critical mass of members of any aggregate collectivity has collective power with respect to most outcomes of the matters in which the collectivity has collective power... each member of that critical mass sub-group has some individual power as well with respect to those matters... in actual cases group dynamics and the personal power over others of individual members may serve to exclude certain members from ever being in the critical mass... Allowing that we may have to exclude certain members who are notably weak or under the influence of others, we may say that if an aggregate collectivity has collective power with respect to some matter, each member of the aggregate has some individual power with respect to that matter; that is, none are powerless.'<sup>88</sup>

The aggregation theory has American ancestry.<sup>89</sup> The leading American case is *US v TIME-DC Inc*<sup>90</sup> where the court said,

'[K]nowledge acquired by employees within the scope of their employment is imputed to the corporation. In consequence, a corporation cannot plead innocence by asserting that the information obtained by several employees was not acquired by any one individual employee who then should have comprehended its full import. Rather the corporation is considered to have acquired the collective knowledge of its employees and is held responsible for their failure to act accordingly.'

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<sup>88</sup> Stone, *Where The Law Ends* (1975) at p 73.

<sup>89</sup> Gobert n 5 at p 404; see *State v Morris and East Sussex Railway* 23 NLJ 360 (1850). Green C J referred to the 'body aggregate.'

<sup>90</sup> 381 F Supp 730 WD Va (1974).



The doctrine continues to find favour in some modern American case law. In the case of *United States v Bank of New England*<sup>91</sup> the company had organised its operations in such a way that individual employees were responsible for different operations in respect of matters which required to be reported under the Currency Transaction Reporting Act. In finding the Bank guilty, the court imputed knowledge to the Bank by aggregating the knowledge of the employees. The court said:

'[I]f employee A knows one facet of the currency reporting requirement, and B knows another facet of it, and C a third facet of it, the bank knows them all... A collective knowledge is entirely appropriate in the context of corporate criminal liability... Corporations compartmentalise knowledge, subdividing the elements of specific duties and operations into smaller components. The aggregate of those components constitutes the corporation's knowledge of a particular operation.'<sup>92</sup>

In Britain there has been no judicial support for the aggregation theory in criminal cases.<sup>93</sup> The one major case where the circumstances seemed most appropriate for its adoption was in the cases that followed the Zeebrugge Ferry disaster. However in *R v HM Coroner for East Kent ex parte Spooner*<sup>94</sup> Bingham J said:

'Whether a defendant is a corporation or a personal defendant, the

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<sup>91</sup> 821 F2d 844 (First Cir) cert denied 484 US 943 (1987).

<sup>92</sup> *US v Bank of New England* *supra* at p 855.

<sup>93</sup> But for tacit support of aggregation theory see *Armstrong v Strain* [1952] 1 KB 232; *London Country Freehold v Berkley Properties* [1936] 2 All ER 1039; *Woyka v London and Northern*, 1922, 10 Lloyds Rep 110; Aggregation supported by civil case of *WB Anderson and Sons Ltd. v Rhodes (Liverpool) Ltd* [1967] 2 All ER 850 cf *Armstrong v Strain* [1952] 1 KB 232; *R v HM Coroner for East Kent ex p Spooner* (1989) 88 Cr App R 10 at 16-7; *Seaboard Offshore Ltd v Secretary of State for Transport* (1993) 1 WLR 1025; nor has Aggregation been accepted in Commonwealth countries; see Colvin, n 91 at p 19. Specifically, it was rejected in *R v Australasian Films Ltd*. 29 CLR 195 (1921).

<sup>94</sup> (1989) 88 Cr App R 10.

ingredients of manslaughter must be established by proving the necessary *mens rea* and *actus reus* of manslaughter against it or him by evidence properly to be relied on against it or him. A case against a personal defendant cannot be fortified by evidence against another defendant. The case against a corporation can only be made by evidence properly addressed to showing guilt on the part of the corporation as such.'

Gobert argues that aggregation provides an alternative and more intellectually satisfying basis than the alter ego doctrine for attributing the knowledge of a corporate official to the company.<sup>95</sup> He does so on the basis of the obvious limitations of the *Natrass* decision where the controlling mind is equated with seniority of position. Under the aggregation theory more junior officials and other servants of the company can form part of the collective knowledge or mind of the company. Secondly, the aggregation theory has appeal where no single individual within the company is in possession of all the facts or information.<sup>96</sup> Only by aggregating knowledge does the fuller picture emerge. One of the consequences of this approach may be that the sum of the knowledge may be greater than the parts.<sup>97</sup> Clearly, there are dangers in such an approach and undoubtedly, the dangers have been a contributory factor in judges such as Bingham J not accepting the concept of aggregation.<sup>98</sup> Smith and Hogan oppose the doctrine of aggregation in offences requiring intention, recklessness or knowledge whilst conceding it may be applicable in negligence.<sup>99</sup> Likewise, the Model Criminal Code prepared by the Criminal Law Officers Committee in Canada hinted at aggregation in negligence.<sup>100</sup> There are other features of aggregation which

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<sup>95</sup> Gobert, n 5 at p 405.

<sup>96</sup> Gruner, *Corporate Crime And Sentencing* (1994) at pp 36-7.

<sup>97</sup> Gobert, n 5 at p 405.

<sup>98</sup> See *Armstrong v Strain* [1952] 1 KB 232 at p 246.

<sup>99</sup> Smith and Hogan, *Criminal Law* (1992) at p 184.

<sup>100</sup> Proposals to Amend the Criminal Code (General Principles) 1993 'if the conduct of the body corporate when viewed as a whole (that is by aggregating the conduct of a number of servants, employees or officers) is negligent' clause 22 however it goes on a corporation is negligent when

are troublesome. A primary question is 'whose knowledge should be aggregated?' Would courts adopt the *Natrass* approach and simply view senior executives as the individuals whose minds could be aggregated to form the necessary *mens rea*? In many respects such an approach diminishes the perceived benefit of aggregation as a model of criminal liability. The 'brains' of the company are in a position to put in place the necessary accounting procedures and policies whereby practices can be brought to the attention of senior executives. If the aggregation model did not concede the possibility of aggregating knowledge from outside the small coterie of senior executives, those self-same executives could 'insulate a company from liability by isolating themselves from their employees and the dangers of which the latter would be aware.'<sup>101</sup> It seems only fair that where a company through its senior officers puts in place appropriate systems and procedures that they should, where the occasion merits it, be able to rely upon the defence of due diligence.

Aggregation reflects the 'atomistic' element in our common-sense conception of organisations. It correctly 'insists on the critical dependence of organisations, both phenomenally and normatively, on the actions and interrelations of individual human beings. However, by equating organisations to a homogeneous group of individuals, aggregation vastly understates the extent and the significance of the complexity and inscrutability of that dependence.'<sup>102</sup>

In the prosecution resulting from the Zeebrugge Ferry disaster one finds an illustration where the court rejected the notion of aggregation of knowledge to the company and dismissed the prosecution in part because the court was not convinced that senior management ought to have known that there was a serious risk of the shipping sailing with its bow doors open. Despite the fact that some shipmasters had been concerned about sailings with the bow doors open, there was no evidence that this had been brought to the attention of the senior executives of P & O. The ability to defend on the basis of an absence

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'one or more of its representatives, having an express or implied authority to direct, manage or control its activity in the area concerned, and in take execution of that authority, fail, individually or collectively, to the degree applicable to that offence, to exercise reasonable care to prevent an occurrence.'<sup>(cl 22(2)(b))</sup>.

<sup>101</sup> Gobert, n 5 at p 406.

<sup>102</sup> Dan-Cohen, *Rights, Persons And Organizations*, (1986) at p 27.

of *mens rea*, essentially on the basis of 'blissful ignorance', has been extensively criticised. Gobert for example argues, that 'the court converted a *mens rea* bordering on 'wilful blindness' into an affirmative defence, and rewarded culpable ignorance in a situation where it should have been structuring the law to encourage corporate diligence.'<sup>103</sup>

Lederman is critical of the aggregation theory on the basis that it might lead to the conviction of legal bodies under far-reaching and absurd circumstances claiming that 'The trend that allows the conviction of a corporation by piecing together the conduct of different agents so as to form the elements of one offence is the result of over-personification of corporate bodies.'<sup>104</sup> Lederman is also critical of aggregation because of the lack of concurrence in the integral components of the crime. There must in her opinion be a causal relationship between the *mens rea* and the *actus reus*. She argues:

'The artificial process of "piecing together" whereby the *mens rea* and *actus reus* of an offense are attributed to the corporation cannot satisfy the demands of the principle of concurrence. Even the proponents of corporate criminal liability concede that the corporate entity cannot by itself produce the elements necessary to consummate the crime. These elements must first evolve in the minds and actions of the perpetrators and only then, by way of legal fiction of identification or imputation, are they attributed to the corporation. Hence, the link required by the concurrence principle must also be supplied first by the organ or agent and only then can it be ascribed to the corporation. However, when the knowledge vital to formation of the link is obviously not manufactured by any human consciousness and it cannot, therefore be claimed that the criminal mind stimulated the forbidden act.'

Where aggregation is not possible Field and Jorg argue that 'Collective

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<sup>103</sup> Gobert, n 5 at p 407; see also Field and Jorg, n 50 at p 161.

<sup>104</sup> Lederman, n 8 at p 306.

responsibility becomes lost in the crevices between the responsibilities of individuals.<sup>105</sup> Its real merit lies in the somewhat more collectivist approach than either vicarious liability or the identification doctrine. Nevertheless, in common with those approaches, it suffers from the fact that it is but another search for the essence of corporate liability rooted in, and routed through, the individuals within that organisation.

## Corporate Fault

All of the foregoing three theories suffer from limitations; they are atomistic rather than holistic. They rest on the premise of designation of individuals whose acts and mental states can be attributed to the company.

Corporate criminal liability is in all three a derivative form of liability.<sup>106</sup> All three theories suffer from the linkage of individual liability to corporate liability through the concept of juristic person. It is because of these limitations and from the desire to have an equitable premise for corporate criminal liability extendible to all forms of corporate criminal activity that scholars have considered 'corporate fault' as a model.<sup>107</sup> The perception is that the attribution of fault or blame in corporate crime more properly requires to focus on collective corporate blame, rather than via the blameworthiness of individuals. If fault underlines individual liability, why should it not precede corporate liability?<sup>108</sup> The nexus between the corporations and the individuals within them needs to be broken or, in any event, redefined. The preoccupation of fitting individualised liability to the corporate form is fraught with difficulty. History points to problems with all three of the foregoing 'atomistic' models of corporate liability. These models have had limited success in providing a juristic basis of liability for corporations' criminal acts. It is dissatisfaction with all three that has led commentators to offer a fourth basis on which criminal liability can be attributed to the corporate form. Fisse

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<sup>105</sup> Field and Jorg, n 50 at p 162.

<sup>106</sup> Gobert, n 5 at p 407.

<sup>107</sup> Colvin, n 69 at p 41.

<sup>108</sup> Gruner, n 96 at pp 80-2.

argues that:

'[I]n the case of corporate criminal responsibility, too little attention has been paid to the possibility of improving the efficacy and justice of its operation. To begin with, our existing ideas upon criteria of ascription of responsibility are fragmentary and primitive. This is true of the central issue of primary vs vicarious responsibility, as well as the subsidiary problems raised by the agency relationship between a corporate accused and the individual person or persons whose conduct or fault is the subject of attribution.'<sup>109</sup>

The theory of corporate fault is one essentially based on collective fault. The company as a whole has liability not by the actions or intentions of individuals within but rather through expressions of the collective will of the company. The most obvious place for such expressions of intent to be found is in company policies and procedures. The development of company policy invariably requires the passage of that policy through an amalgam of individuals and sub-groups within the organisation. Any policy so arrived at may represent either a synthesis of views or a compromise of views.<sup>110</sup> Where the company's mind is equated with the policies of the company, such policies represent expressions of corporate intention. If through their operation, a criminal act ensues, the theory says that the company will be liable. Clearly, such a model of corporate fault can apply in a whole range of circumstances and can be applied to both common law crimes and statutory crimes. The obvious lacuna is where the company does not have formalised policies at all or does not have policies pertaining to particular aspects of its activities. The great benefit of moving towards to a corporate fault model of corporate crime lies in the fact that it will loosen corporate criminal liability from its 'anthropomorphic moorings.' Gobert argues that:

'[C]ompanies should bear responsibility for crimes occurring in

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<sup>109</sup> Fisse, n 11 at p 410.

<sup>110</sup> Gobert, n 5 at p 408 Op Cit.

the course of their business without the need for the Crown to attach fault to specific persons within the company. It should be the company's responsibility to collect information regarding potential dangers possessed by employees, collate the data, and implement policies which will prevent reasonably foreseeable risks from occurring. If the company is derelict in this duty and a crime has resulted, it must share in the responsibility of the resulting harm. The shift of judicial attention from individual to corporate fault would have several side benefits. It would avoid the evidentiary problem of tracing the strands of responsibility to particular individuals, with its inherent dangers of scapegoating... [S]hifting the onus of responsibility to the company would also avoid the conundrum of aggregating a number of negligent acts into a sum which is claimed to warrant a finding of recklessness or gross negligence. If there is fault to be attributed to the company, it is to be found in the way that the company organises or operates its business affairs. It is often argued that a company cannot act except through real persons - directors, officers and employees. This may be so, but it need not control the law's approach to corporate criminality."<sup>111</sup>

The trend towards corporate blameworthiness which Wells argues is evident in Anglo-American jurisdictions, is primarily a response to the inefficiency and unsatisfactory nature of the *Natrass* philosophy and vicarious liability.<sup>112</sup> Whilst recognising a subtle drift from the *Natrass* philosophy towards a newer model of corporate fault, Wells offers a cautionary note. She contends that there has been:

'a subtle transformation of traditional judicial attitudes based on the notion of director and officer control to a modern understanding of the power of corporations to produce economic

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<sup>111</sup> Gobert, n 5 at pp 409-410.

<sup>112</sup> C Wells, 'The Corporate Manslaughter Proposals: Pragmatism, Paradox And Peninsularity', 1996, *Crim LR* 545 at p 574.

and personal harm and the consequent importance of seeking to control them through effective mechanisms of criminal law.<sup>113</sup>

Corporate fault is then a conceptually different approach to corporate criminality:

"The company is treated as a distinct organic entity whose "mind" is embodied in the policies it has adopted. Corporate policy is often different from the sum of the inputs of those who helped to formulate the policy, and typically is the product of either synthesis of views or a compromise among competing positions. Policy may also reflect the company's corporate ethos. This ethos which is often unwritten, may have been forged by founders of the company who are no longer actively involved in its day-to-day affairs. When company policy or corporate ethos leads to the commission of a crime, the company should be liable in its own right and not derivatively."<sup>114</sup>

The attraction of such an approach is that it takes one away from the *actus reus/mens rea* polemic. Individualism is supplanted by what Gobert calls a more expansive view of causation. It also has appeal in the fact that it moves away from the application of conventional criminal liability to the corporate form.<sup>115</sup> Gobert sees distinct advantages in this in that it will take away the problems associated with the 'courts' attempts to squeeze corporate square pegs into the round holes of criminal law doctrines which were devised with individuals in mind.<sup>116</sup> According to Gobert's own corporate fault model, the 'focus would be on the creation of risks likely to lead to the occurrence of serious harm. If the harm in fact materialised, the company's liability would be for the failure to prevent the harm rather than for the

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<sup>113</sup> Wells, n 52 at p 1327.

<sup>114</sup> Gobert, 'Corporate Criminality: New Crimes For The Times', 1994, *Crim LR* 722-734 at pp 723-4.

<sup>115</sup> Gobert, n 114 at p 724.

<sup>116</sup> Gobert, n 114 at p 724.



substantive crime itself.' The company has an obligation to prevent crime under this model. In practice this means their development of policies and their implementation and the establishment of corporate ethos. As Gobert argues '*Mens rea* is one way, but not the only way, of getting at the issue of blameworthiness.'<sup>117</sup> The defence for a company facing criminal liability under a corporate fault model would be that of due diligence. Gobert argues that the burden of proving due diligence should fall upon the corporation. In satisfying the test of due diligence Gobert suggests that the courts should adopt a test which clearly has its origins in health and safety law, with a balance being struck between the risk created against the social utility of the activity weighed against the cost and practicability of eliminating the risk. Gobert is unclear whether due diligence should be delineated by Parliament or by the judiciary. What he is clear about is that due diligence should be evidenced not just by senior management but rather by the organisational structure.<sup>118</sup>

Whilst recognising the importance of the relationship between individual liability and corporate liability, what is required is a distinction of both and for autonomous corporate culpability disassociated from culpability transmitted through corporate officials. Those who argue strongly for corporate fault draw support from the work of French and Dan Cohen.<sup>119</sup> Their approach presupposes that 'companies of sufficient organisational complexity develop over time an intentionality and reasons for acting which exist in a realm separate from the individual intentions and motivations of the individuals currently connected with the company.'<sup>120</sup> Policies contain basic

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<sup>117</sup> Gobert, n 114 at p 729.

<sup>118</sup> Gobert, n 114 at p 732.

<sup>119</sup> French, *Collective and Corporate Responsibility*(1979); French, 'The Corporation as a Moral Person', 1979, 16 *American Philosophical Quarterly* 207 - 215; Dan-Cohen, *Rights, Persons and Organizations* (1986).

<sup>120</sup> Sullivan, 'Expressing Corporate Guilt', 1995, 15 *Oxford Journal of Legal Studies* 281-293 at p 284; French suggests the following method of determining whether a corporation is sufficiently organised:  
1- internal organisation and/or decision procedures by which courses of concerted action can be chosen;  
2-enforced standards of conduct different and more stringent than those applying in the wider community;  
3- members filling differing defined roles by virtue of which they exercise power over other members.

belief and goal statements<sup>121</sup> and as such, intent can be fixed to policies, rules and practices.<sup>122</sup> A problem with corporate fault is that organisations inhere as 'much in its informal practices as in its official decisions.'<sup>123</sup> Moreover, one of the evident problems in deducing corporate attitudes and culpability from policies is that 'companies may by the setting of their institutional priorities, create a climate which discourages obedience to known rules'.<sup>124</sup>

Colvin has argued that mere evidence of criminogenic corporate culture should provide a sufficient fault element for those offences that can ordinarily be committed recklessly.<sup>125</sup> Such a proposition requires clarification of how one will establish criminogenic culture. If it involves a pre-trial view of past convictions it may wreak too much of the sins of the past being visited upon the corporation. There will require to be a clear understanding that in looking to past indiscretions one is merely seeking evidence of practices which exhibit corporate philosophy. Even that approach may be far too controversial. Fisse and Braithwaite claim that the notion of corporate blameworthiness has been accepted and now the real challenge is to find a workable concept of corporate

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<sup>121</sup> P French, *Collective And Corporate Responsibility*, (1979) at p 57 op cit.

<sup>122</sup> Colvin, n 69 at p 32.

<sup>123</sup> Colvin, n 69 at p 35.

<sup>124</sup> Field and Jorg, n 50 at p 166.

<sup>125</sup> Colvin, n 69 at p 38; A suggestion by Colvin for a model of corporate fault liability based on recklessness is:

*'1 If recklessness is a required fault element of an offense, that fault element may be established by proof that the culture of a corporation caused or encouraged non-compliance with the relevant provision*

*2.(a) If purpose is a required fault element of an offense, that fault element may be established by proof that it was the policy of a corporation not to comply with the relevant provision*  
*(b) A policy may be attributed to a corporation where it provides the most reasonable explanation of the conduct of that corporation*

*3.(a) If knowledge is a required fault element of an offense, that fault element may be established by proof that the relevant knowledge was possessed by a corporation*  
*(b) Knowledge may be attributed to a corporation where it was possessed within the corporation and the culture of the corporation caused or encouraged knowing non-compliance with the relevant provision'* Colvin, n 69 at p 41.

fault.<sup>126</sup> With their support of reactive corporate fault they very much endorse *post hoc* assessment of the corporation's blameworthiness. In a British context, instinctively one feels that assessment of corporate fault will require to be a contemporary assessment of corporations' policies, practices, procedures, ethos or culture, but that corporations should be afforded the protection from revisitation of past offences as a basis of identifying corporate fault. Bucy offers a variation, arguing that corporate fault might be founded upon the basis of corporate ethos, which she suggests might be deduced from the amount of compliance-education the company gives its employees, its attitudes to compensation and indemnification, and its practices.<sup>127</sup> Systems analysis also offers interesting possibilities.<sup>128</sup> British courts are reasonably well versed in dealing with offences under section 2 of the Health and Safety at Work Act 1974 where employers can be found guilty of not operating a safe system.

According to Wells, *Seaboard Marine* and *Tesco v London Borough of Brent* demonstrate a realism in the courts<sup>129</sup> that society appears to need the concept of organisational blame.<sup>130</sup> Her view is that some of the recent cases display judicial perception as to the irrelevance of the identification theory to corporate risk taking.<sup>131</sup> She argues that:

'legal ideas in this sphere have matured from reliance on the agency identification dyad (represented by the vicarious and direct routes to liability) to the faint tremors of an emerging recognition

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<sup>126</sup> Fisse and Braithwaite, *Corporations, Crime and Accountability* (1993), at p 47.

<sup>127</sup> Bucy 'Corporate Ethos: A Standard For Imposing Corporate Criminal Liability' 75 *Minn L R* 1095 (1991); see also Sigler and Murphy, *Interactive Corporate Compliance: An Alternative To Regulatory Compulsion* (1988); Quaid, 'The Assessment of Corporate Criminal Liability on the Basis of Corporate Identity: An Analysis', 1998, 43 *McGill LJ* 67.

<sup>128</sup> See Wells, 'Corporate Manslaughter: A Cultural And Legal Form' <http://camlaw.rutgers.edu/crimlawforum/wells.html>. at p 13.

<sup>129</sup> Wells, n 128 at p 13.

<sup>130</sup> L Dunford and A Ridley, 'Corporate Manslaughter- Time For Reform', 1996 Paper at p 5.

<sup>131</sup> Wells, n 128 at p 5.

that company policies and systems might form the basis for the ascription of criminal responsibility.<sup>132</sup>

Colvin similarly adopts the view that criminal law should be made to focus directly on the issue of organisational culpability:

'if the shackles of derivative liability were removed, corporations would face substantial exposure to liability for their omissions... it might be appropriate to increase this exposure through the imposition of a general duty upon corporations to guard against their operations causing harm and their structures and resources being used to cause harm.'<sup>133</sup>

Interestingly, the new proposal for an offence of corporate-killing seeks to develop the concept of organisational blameworthiness.<sup>134</sup> Whilst this is a welcome development, it still requires definition and elucidation. One danger may be the desire to equate this simply with managerial failings. In the process we may simply be reinventing the *Natrass* philosophy by the back door. The organisation as a collectivity is more than its managers. Corporate fault must look to collective failing rather than the failings on one section of the organisation.

## Conclusion

It does appear that 'There is clearly dissatisfaction with the traditional derivative models of corporate liability and interest in exploring alternatives. As yet, the direction forward remains unsettled.'<sup>135</sup> For the corporate offender, the normal route of criminal attribution based upon moral fault is fraught with

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<sup>132</sup> Wells, n 128 at p 6.

<sup>133</sup> Colvin, n 69 at p 25.

<sup>134</sup> The English Law Commission, '*Legislating the Criminal Code: Involuntary Manslaughter*' No 237 (1996); Ridley and Dunford, 'Corporate Killing - Legislating For Unlawful Death', 1997, 26 2 *Industrial Law Journal* 99-113; Wells, 'Corporate Killing', 1997, *NLJ* 1467 -1468.

<sup>135</sup> Colvin, n. 69 at p. 3.

difficulty but surmountable for all that. The concepts of power and acceptance form the basis of a model of liability in the United Kingdom. Power and acceptance carry with them hierarchical connotations. As we have seen in several recent English cases, reference to the hierarchy provides nonsensical results.

For all the criticisms of vicarious liability and the identification doctrine, they have endured because we have not as yet formulated an intellectually satisfying basis on which to attach liability. Corporate fault seemingly represents the solution but it too requires some refinement. Foerschler summarises the nature of the dilemma by saying that the atomistic view, while recognising that a corporation is an aggregate of individuals, underestimates the added 'complexity and inscrutability' of the corporate structure itself. At the same time, a strict holistic approach exaggerates the unity of the corporation.<sup>136</sup> Identification, warts and all, continues to hold primacy in the United Kingdom courts but our attachment to identification as a doctrine should not be complete. The recent attempts to develop a more holistic approach to liability reflecting corporate culpability are to be welcomed as a more satisfactory basis on which to ascribe liability. Eser has claimed that 'it is... a permanent obligation of criminal jurisprudence to refine the principles of criminal liability'.<sup>137</sup> In reconstructing corporate criminal liability the task is slightly more challenging and that is to devise an altogether more satisfactory basis, one based on corporate fault, for the ascription of liability to the corporation. Only in that way can corporate criminal liability in the United Kingdom be placed on a proper intellectual footing.

Richard Mays  
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<sup>136</sup> Foerschler, n 7 at p 1299.

<sup>137</sup> Eser, 'The Principle Of Harm In The Concept Of Crime: A Comparative Analysis Of The Criminally Protected', 1965-6, *Legal Interests 4 Duquesne L Rev* 345 at p. 365; quoted in Seney, 'A Pond As Deep As Hell- Harm, Danger And Dangerousness In Our Criminal Law', 1971, 17 *Wayne LR* at p 1117.